

12271

United States
Court of Appeals

For the Ninth Circuit.

LEWIS FRED PENWELL and SUSANNAH W.
PENWELL, Executor and Executrix of the
Estate of Lewis Penwell, formerly Collector of
Internal Revenue for the District of Montana,
deceased,

Appellants,

vs.

JOHN N. NEWLAND, JAMES TULLIS,
GEORGE I. MARTIN, and BUTTE EXECU-
TIVES CLUB, a non-profit unincorporated
association,

Appellees.

Transcript of Record

Upon Appeal from the United States District Court
for the District of Montana.

FILED

AUG - 5 1949



12271

United States
Court of Appeals

For the Ninth Circuit.

LEWIS FRED PENWELL and SUSANNAH W.
PENWELL, Executor and Executrix of the
Estate of Lewis Penwell, formerly Collector of
Internal Revenue for the District of Montana,
deceased,

Appellants,

vs.

JOHN N. NEWLAND, JAMES TULLIS,
GEORGE I. MARTIN, and BUTTE EXECU-
TIVES CLUB, a non-profit unincorporated
association,

Appellees.

Transcript of Record

Upon Appeal from the United States District Court
for the District of Montana.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Agreed Statement of Facts.....	14
Answer	10
Appeal	
Notice of.....	39
Complaint	2
Decision	33
Designation	41
Designation of Record to Be Printed.....	46
Findings of Fact and Conclusions of Law.....	35
Motion for Substitution.....	30
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	39
Order for Time to Docket and File the Record on Appeal Pursuant to Rule 73 G of the Rules of Civil Procedure.....	42, 42
Order of Substitution of Parties Defendant....	32
Stipulation Supplementing Agreed Statement of Facts.....	26



NAMES AND ADDRESSES OF ATTORNEYS

MR. JOHN B. TANSIL,
United States Attorney,
Billings, Montana.

MR. HARLOW PEASE,
Assistant United States Attorney,
Butte, Montana.

MR. EMMETT C. ANGLAND,
Assistant United States Attorney,
Great Falls, Montana.
Attorneys for Appellants and
Defendants.

MR. T. J. DAVIS,
Butte, Montana, and

MR. L. C. MYERS,
Butte, Montana.
Attorneys for Appellees and Plaintiffs.

In the District Court of the United States for the
District of Montana, Butte Division

Civil No. 350

JOHN N. NEWLAND, JAMES TULLIS,
GEORGE I. MARTIN, and BUTTE EXECU-
TIVES CLUB, a Non-Profit Unincorporated
Association,

Plaintiffs,

vs.

LEWIS PENWELL, Individually and as COL-
LECTOR OF INTERNAL REVENUE FOR
THE DISTRICT OF MONTANA,

Defendant.

COMPLAINT

Come now the plaintiffs above named, and for
their cause of action against the defendant, com-
plains and alleges:

I.

Plaintiff, Butte Executives Club, is a non-profit
unincorporated associated with its business ad-
dress at First National Bank Building, Butte,
Montana.

II.

That the plaintiffs above named, prior to the
times herein mentioned, associated themselves with
one hundred ninety other persons for the purpose
of the education of themselves and of the other mem-

bers of the plaintiff, Butte Executives Club, and that said association of members is known and described as the Butte Executives Club; that the question herein involved is one of common and general interest to all of the members of the said association, and that it is impracticable to bring all of said plaintiffs and members of the association who are interested in the question involved herein before the Court; and that this action is brought not only for the benefit of the above-named plaintiffs, but also for the benefit of all other members of the aforementioned association, who have a common interest in enforcing liability under the allegations of this complaint. [3*]

III.

That during the years 1944, 1945, and 1946, the following named persons were duly elected, qualified, and acting members of said Butte Executives Club, to wit: John N. Newland, James Tullis, and George I. Martin.

IV.

That Lewis Penwell, defendant herein, now is and ever since July 6, 1933, has been Collector of Internal Revenue for the District of Montana, residing within the Judicial District of the State of Montana and within the jurisdiction of this Court.

V.

This Court has jurisdiction of the cause of action stated in this complaint in that said cause of action

arises under the laws of the United States, to wit: Internal Revenue Code (Act of February 10, 1939, c. 2, 53 Stat. (Part I), Pub. No. 1, 76th Cong., 1st Sess.-H. R. 2762), as amended. And this Court has jurisdiction under the provisions of Sec. 41(5) Title 28, U.S.C.A.

VI.

This action is brought to recover a sum illegally collected as Federal admission taxes and withheld from plaintiffs, by defendant, as hereinafter set forth, together with interest thereon as provided by law.

VII.

The purpose of plaintiff, Butte Executives Club, is the education of its members through informal talks. Each person admitted to membership must pay to plaintiff, Butte Executives Club, a \$10.00 initiation fee and annual dues of \$10.00, payable in advance. During the month of September, 1945, plaintiff, Butte Executives Club, collected an aggregate amount of \$1,910.00, being \$10.00 from each of twenty-eight new members for initiation fees, and \$10.00 from each of one hundred sixty-three members for annual dues. Neither said initiation fees nor said dues, nor any part thereof, were paid as or for admission to any place. The Commissioner of Internal Revenue erroneously treated the said collections as payments "for admission to any place"; and the defendant, on October 28, 1945, illegally collected from plaintiff, Butte Executives

Club, in respect of said collections, the sum of Three Hundred Eighty-two Dollars (\$382.00) as admission [4] taxes under section 1700 of the Internal Revenue Code, as amended. Said sum of Three Hundred Eighty-two dollars (\$382.00) was involuntarily paid by plaintiff, Butte Executives Club, to defendant.

VIII.

That the levying and collecting of the amount herein set forth as taxes by the Commissioner of Internal Revenue, upon the payments referred to herein, was erroneous, invalid, and unlawful under the laws and statutes of the United States and the facts hereinbefore set forth and said plaintiffs were and are entitled to the allowance of said claim and demand, a copy of which claim and demand is marked Exhibit "A," hereto attached, and made a part of this complaint, and a return of the moneys paid upon said payments as aforesaid.

IX.

That on or about December 3, 1945, plaintiff, Butte Executives Club, filed with the Collector of Internal Revenue for the District of Montana a claim and demand for refund for the sum of Three Hundred Eighty-two Dollars (\$382.00), which claim and demand for refund was rejected by the Commissioner of Internal Revenue in a letter mailed by the Commissioner to plaintiff by registered mail on February 26, 1946; that a copy of said claim

and demand is hereto attached, marked "Exhibit A," and specifically referred to as a part of this complaint. Neither the said sum of Three Hundred Eighty-two Dollars (\$382.00) nor any part thereof has been paid, credited, or refunded to plaintiffs.

Wherefore, Plaintiffs pray that they be permitted to maintain this action for and on behalf of all of the members of the Butte Executives Club, the association herein mentioned and a party plaintiff who will unite with plaintiffs in the suit, and that an order of this Court to that effect and for such purpose be forthwith made; and plaintiffs further pray that judgment be entered for the plaintiff, Butte Executives Club, and against the defendant in the amount of Three Hundred Eighty-two and No/100 Dollars (\$382.00), or such other amount as the Court may determine, [5] together with interest thereon as provided by law, and for the costs and disbursements of this action.

T. J. DAVIS,

Attorney for Plaintiffs.

District and State of Montana,
County of Silver Bow—ss.

James Tullis, being first duly sworn, on his oath deposes and says: That he is one of the plaintiffs named in the above-entitled action; that he has read the above and foregoing Complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those things therein

stated on information and belief, and as to those things he believes them to be true.

JAMES TULLIS.

Subscribed and sworn to before me this 31st day of December, A.D. 1946.

[Seal]

G. V. BREW,
Notary Public for the State of Montana, Residing
at Butte, Montana.

My Commission expires Oct. 8, 1949.

Personal service of summons and complaint on the United States Attorney for Montana is hereby admitted this January 28, 1947.

JOHN B. TANSIL,
U. S. District Attorney for
Montana.

HARLOW PEASE,
Assistant U. S. Attorney. [6]

Filed: December 31, 1946

EXHIBIT "A"

Form 843

Treasury Department
Internal Revenue Service
(Revised July, 1947)

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below

the kind of claim filed, and fill in the certificate on the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes.)

State of Montana,

County of Silver Bow—ss.

Name of taxpayer or purchaser of stamps,
Butte Executives Club.

Business address,

First National Bank Building, Butte, Montana.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—
Montana.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
Sept. 1, 1945, to Oct. 1, 1945.

3. Character of assessment or tax, Admission.

4. Amount of assessment, \$382.00; dates of payment, October 29, 1945.

6. Amount to be refunded, \$382.00.

8. The time within which this claim may be le-

gally filed expires, under sections 3313 & 3370 of the Internal Revenue Code on October 29, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

Butte Executives Club is a non-profit unincorporated organization for education of its members through informational talks. Each person admitted to membership must pay to the Club a \$10 initiation fee and annual dues of \$10 payable in Advance. During the month of September, 1945, the Club collected initiation fees and annual dues from its members aggregating \$1,910. The Commissioner has erroneously treated the said collections as payments for admission to any place; and the Collector of Internal Revenue for the District of Montana, on October 29, 1945, illegally collected from the Club, in respect of the said collections, the sum of \$382. as admission taxes under sec. 1700 of the Internal Revenue Code, as amended.

/s/ BUTTE EXECUTIVES CLUB.

By E. R. BLINN.

Subscribed and sworn to before me this 5th day of December, 1945.

[Seal] JOE ZUPIN,

Notary Public for the State of Montana, Residing
at Butte, Montana.

My commission expires Nov. 4, 1946. [7]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above-entitled action and for answer to the plaintiff's complaint, admits, denies and alleges:

I.

The defendant admits the allegations of paragraph one of the complaint.

II.

The defendant admits that the plaintiffs Newland, Tullis and Martin, were associated with one hundred ninety other persons for the stated purpose of the education of themselves and of the other members of the plaintiff, Butte Executive Club, and that the said association of members is known as the Butte Executive Club. The defendant is without information and knowledge sufficient to form a belief as to the truth of the remaining allegations contained in paragraph two.

III.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph three of the complaint.

IV.

Answering paragraph four, defendant admits that Lewis Penwell was the Collector of Internal Reve-

nue for the District of Montana at the time of the filing of said complaint, and alleges that Thomas M. Robinson now is, and ever since July 1, 1947, has [9] been the Collector of Internal Revenue for the District of Montana, residing within the Judicial District of the State of Montana, and within the jurisdiction of this Court.

V.

The defendant denies the allegations contained in paragraph five of the complaint.

VI.

Answering paragraph six of the complaint, the defendant admits that this action is brought to recover a sum collected as Federal admission taxes withheld from plaintiff together with interest thereon. The defendant denies the allegations or the implication of the allegation that the taxes were illegally collected and illegally withheld from the plaintiff by the defendant.

VII.

Answering paragraph seven of the complaint, the defendant admits that the stated purpose of plaintiff, Butte Executive Club, is the education of its members through informal talks, and that each person admitted to membership must pay to plaintiff, Butte Executive Club, \$10.00, denominated an initiation fee and what is stated to be annual dues of \$10.00, payable in advance. Defendant further admits that during the month of September, 1945,

plaintiff, Butte Executive Club, collected an aggregate amount of \$1,910.00, being \$10.00 from each of twenty-eight new members for what was denominated initiation fees, and \$10.00 from each of one hundred and sixty-three members for what was stated to be annual dues, and it is further admitted that the Commissioner of Internal Revenue treated the said collections as payments "for admission to any place"; and that the defendant collected from plaintiff, Butte Executive Club, in respect of such collections the sum of Three Hundred Eighty-two Dollars (\$382.00) as admission taxes under section 1700 of the Internal Revenue Code as amended. The defendant denies the remaining allegations of this paragraph of the complaint.

VIII.

The defendant denies the allegations set forth and contained [10] in paragraph eight of the complaint save and except it is admitted that Exhibit "A" is a copy of the claim for refund filed with the Commissioner of Internal Revenue.

IX.

The defendant denies the allegations set forth and contained in paragraph nine of the complaint save and except that it is admitted that Exhibit "A" is a copy of the claim for refund filed with the Commissioner of Internal Revenue, and it is further admitted that said claim was rejected by the Commissioner on February 26, 1946, and it is further ad-

mitted that no part of the said sum of \$382.00 has been paid, credited or refunded.

For a further and second defense to the action set forth in plaintiff's complaint, the defendant admits, denies and alleges:

I.

This court has no jurisdiction of the action on the ground and for the reasons:

(1) The said plaintiffs, Newland, Tullis and Martin, have not, as individuals filed any claims for refund of tax with the Commissioner of Internal Revenue as required by Section 3772 (a) of the Internal Revenue Code.

(2) If the suit is sought to be maintained by the Butte Executives Club, a non-profit unincorporated association, as agent for its members, then it has failed to comply with Section 101.42 of Treasury Regulations 43, which required the claimant to submit with the claim for refund the following information:

(a) An alphabetical list of the names of the taxpayers, showing the amount claimed in behalf of each, and the dates on which the amounts were paid to the Collector of Internal Revenue.

(b) A power of attorney executed by each person in whose behalf the claim is filed authorizing the organization to act as his agent. The power of attorney must be prepared on the usual form of such instruments; must be acknowledged before a notary public or signed in the presence of two wit-

nesses and must include a statement that any revocation will not be effective until the Commissioner receives notification. [11]

(c) A copy of the constitution or by-laws or other rules and regulations of the organization, together with a copy of each amendment thereto.

Wherefore, the defendant prays that the plaintiff take nothing by his complaint, and that the same be dismissed with costs assessed against the plaintiff.

JOHN B. TANSIL,
United States Attorney, in and for the District of
Montana.

HARLOW PEASE,
Assistant United States Attorney in and for the
District of Montana.

EMMETT C. ANGLAND,
Assistant United States Attorney in and for the
District of Montana.

Filed August 20, 1947. [12]

[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS

Come now the parties above named through their respective counsel and submit the above cause for decision by the Court upon the agreed facts hereinafter set forth, each of said parties hereby ad-

mitting for the purpose of this case only that said facts are true and correct, and each of said parties hereby moving for summary judgment in its or his favor upon the facts so agreed upon and admitted, to wit:

I.

The plaintiff, Butte Executives Club, is a non-profit unincorporated association organized in July of 1944, with its business address at First National Bank Building, Butte, Montana.

II.

The action arises under the provisions of Section 1700(a) of the Internal Revenue Code of the United States (Title 26 USC, Section 1700) and the Court has jurisdiction under the provisions of Section 41(5), Title 28, USC.

III.

At all times mentioned in plaintiffs' complaint, the defendant, Lewis Penwell, was Collector of Internal Revenue for the District of Montana. [14]

IV.

That John N. Newland, James Tullis and George I. Martin, plaintiffs named in the complaint, were associated with one hundred ninety other persons as members of the plaintiff, Butte Executives Club.

V.

That the by-laws of plaintiff, Butte Executives Club, are as set forth in Exhibit "A" hereto attached and made a part hereof.

VI.

That the affiliation agreement referred to in Article VI of the by-laws of the plaintiff, Butte Executives Club, is hereto attached as Exhibit "B" and made a part hereof.

VII.

The Associated Executives Clubs, Incorporated, is chartered under the laws of the State of Delaware and has for its purpose the production of education and entertainment talent through its activities as a booking agency, and the promotion and organization of local Executives Clubs in cities throughout the United States, as an outlet for such talent booked by them; and it derives its money from an initiation fee of \$10.00 and membership fee of \$10.00 collected for first year by the local Executive Club from each member, as agent, and remitted, except for \$1.00 per member until the end of first fiscal year on last day of June, 1945, by the local club to the Associated Executives Clubs, Incorporated, after which time all dues and initiation fees are used by local clubs to pay speakers and for necessary local expense. After first year all speakers are secured through the Associated Executives Clubs, Incorporated, for which Butte Executives Club makes remittance to the Associated Executive Clubs, Incorporated, in accordance with the particular agreement embracing the particular speaker, as is more fully set forth in Exhibit "B" hereto attached. The period for which the tax was collected

from Butte [15] Executives Club was the second year, viz. July 1, 1945, to July 1, 1946.

VIII.

Admission to lectures for the education and entertainment of members of the Butte Executives Club is by membership card only. Admission is restricted to members and qualified guests, as provided in the by-laws of the plaintiff club, and in particular Article 5 of Exhibit "A" hereto attached and made a part hereof; the only benefit derived by the members and the only thing of value received in return for a \$10.00 initiation fee and annual dues of \$10.00, payable in advance by each person admitted to membership to the Butte Executives Club, is the privilege of attending the lectures scheduled by the Butte Executives Club and the privilege of taking guests as defined in Article 5 and guests as determined by the Board of Directors as provided for in said Article 5.

IX.

The stated purpose of plaintiff, Butte Executives Club, is as stated in Exhibits "A" and "B" hereto attached and made a part hereof; that during the month of September, 1945, plaintiff, Butte Executives Club, collected an aggregate amount of \$1910.00, being \$10.00 from each of twenty-eight new members for what was denominated initiation fees, and from each of one hundred sixty-three members for what was stated to be annual dues, said sum representing total amount due from members

for the year from July 1, 1945, to July 1, 1946, and that no other money was collected from the members either as taxes or otherwise; and the Commissioner of Internal Revenue treated the said collections as payments "for admission to any place" and collected from plaintiff, Butte Executives Club, on the 28th day of October, 1945, the sum of \$382.00 as admission taxes under Section 1700 of the Internal Revenue Code, as amended (Title 26 USC); that no taxes were exacted from Butte Executives Club for collections made from members for the period beginning July 1, 1944, and ending June 30, 1945. [16]

X.

That Exhibit "A" attached to the complaint is a copy of the claim for refund filed with the Commissioner of Internal Revenue, and that said claim was rejected.

XI.

The sum of \$382.00 collected by the Commissioner of Internal Revenue, hereinbefore referred to, was paid out of the treasury of the Butte Executives Club.

XII.

The sole question to be determined herein is whether the assessment and collection of said tax was valid and lawful under the laws and statutes of the United States and facts herein set forth, and whether said plaintiffs were and are entitled to the allowance of said claim for refund and a return

of the tax paid in the amount of \$382.00, with interest.

T. J. DAVIS,
L. C. MYERS,
Attorneys for Plaintiffs.

JOHN B. TANSIL,
U. S. Attorney.

HARLOW PEASE,
Assistant U. S. Attorney.

EMMETT C. ANGLAND,
Assistant U. S. Attorney,
Attorneys for Defendant.

EXHIBIT "A"

By-Laws

Butte, Montana, 7/21/44.

Article I

Name

Section 1: This organization shall be known as the Butte Executives Club.

Article II

Purpose

Section 1: The purpose and objects of this organization shall be, for education of its members through informational talks. It shall be a non-profit organization.

Section 2: This Club, as an organization, shall not in any way participate in the political candidacy

of any person, nor shall the machinery of the Club be used in any way for political purposes.

Article III.

Membership

Section 1: Only persons of good moral character shall be eligible to membership in this Club. The membership shall be limited to 200 members, provided, however, this number may be changed by the Board of Directors.

Section 2: Any member may resign from this Club, and such resignation shall be immediately effective upon its delivery to the Board of Directors, providing all indebtedness of such person has been paid, including his dues for the year in which such resignation becomes effective. Expulsion of a member shall be the only remedy for non-payment of dues.

Section 3: Membership applications shall be received by the Board of Directors, its Executive Committee, if one is named, or Membership Committee, if such is determined, and they shall approve such applications.

Article IV.

Officers

Section 1: The business and affairs of this Club shall be managed by a Board of 12 Directors, who shall be elected at, or prior to, the first meeting of the Club, Four Directors for 1 year. Four for 2 years, and Four for 3 year terms, and at each election thereafter four Directors shall be elected for

3 years each. First Directors to be determined by lot, or other suitable means, as regards terms of office. The Board of Directors shall elect a President, one or more Vice-Presidents from their own number, and a Secretary-Treasurer, who may be, but need not be, a member of the Board of Directors, but who shall act as "ex-officio" member of the Board. The President and Board of Directors shall appoint from time-to-time such Committees as they deem necessary. The fiscal year ending on the last day of June, it is herewith provided that election of Four Directors for each fiscal year be held prior to the close of the fiscal year, the election of Directors being by ballot of the membership, notice of which shall be furnished the membership in advance, and determination of nominations resting with the Directors. The officers each year being elected as above provided, namely, President, etc. Officers and Directors, excepting the office of Secretary-Treasurer, shall not succeed themselves, but a lapse of one year shall be had. The Secretary-Treasurer may continue in office if so re-elected by the Directors.

Section 2: The election of Directors each year shall be announced 10 days prior to the election to the membership. Any vacancies on the Board of Directors shall be filled by the Directors at such a meeting as may be designated and determined for the purpose.

Section 3: A majority of the Directors present, or its Executive Committee, if such is determined,

following notification of such meeting to all members of the Board of Directors, by the Secretary, in reasonable time, shall constitute a quorum for the conduct of such business as may come before the meeting. [19]

Section 4. The Board of Directors and Officers of the Club elected at the first meeting or otherwise, shall hold office until the next annual meeting and until their successors have been duly elected and qualified.

Article V.

Meetings

Section 1: The Board of Directors shall arrange for the dinners and meetings of the Club each year, at such time, place, and cost providing such speaking in their judgment shall best carry out the purpose of this organization.

Section 2: Each membership shall include the wife or "lady" friend, any children of Hi-school or College age, not gainfully employed, out-of-town house guest, out-of-town business guests. Out-of-town, being defined as outside the immediate trade area of the Club. Memberships held by the women shall provide comparable guest privileges. Other guest privileges, such as "local guest night" or "special guests," shall be determined by the Board of Directors.

Article VI.

Club Relationship

Section 1: As stated in the Affiliation Agreement

of the Associated Executives Clubs, Inc., the local club is a recognized affiliate of all other Executives and Knife and Fork Clubs associated, and provisions of visiting are reciprocal in all other Clubs.

Article VII.

Amendments

Section 1: These By-laws, as they have been provided for the use of the local Club, may be amended by a two-thirds vote of the members present at any meeting of the Club, provided notice of the proposed amendment shall be given at a previous meeting or otherwise, to all members of the Club in good standing. [20]

EXHIBIT "B"

Working Agreement

Devoted to a Better Acquaintance Among America's
Business and Professional Aristocracy

This Working Agreement entered into this 19th day of July, 1944, between Associated Executive Clubs, Inc., a Delaware corporation, party of the first part, and the undersigned persons forming Butte, Montana, Executives Club, parties of the second part.

Whereby it is mutually agreed that said party of the first part will assist parties of the second part in formation and continuance of a local Club in above-named city. Party of the first part agrees to furnish, at its own expense, promotional service to assist parties of the second part in completing club membership. The club shall exist for the sole

purpose of promoting educational, patriotic, cultural, and scientific interest in the above-named city and state.

It is mutually agreed that one dollar per member shall be allotted for local expenses during first fiscal year and that all other income from initiation fee and dues, until end of first fiscal year on last day of June, 1945, shall be used by party of first part for organization work and guest speakers until end of first fiscal year. Fifty per cent of all collections shall be paid to party of first part as collected, and balance, after deducting \$1.00 per member for local budget, be remitted in equal installments on dates speakers appear. In case local expenses exceed \$1.00 per member, party of the first part agrees to defray all expenses approved in writing by its representatives.

First party agrees to furnish seven guest speakers during first fiscal year, also membership cards, newspaper mats, news stories, etc. Local Club agrees to furnish dining room, to pay federal, state and local taxes if any should be required, and any other necessary local expense, same to be defrayed from local budget, as specified above. An initiation fee of \$10.00 shall be collected for each member admitted to the Club at any time. Annual dues shall be \$10.00 per member payable in advance. (Dues shall be in addition to initiation fee for first year of each membership.) Each member shall pay for meals in addition to initiation fees and dues.

After first year, all dues and initiation fees shall

be used by local Club to pay speakers and for necessary local expense. Payment for each speaker shall be made on date of his appearance. It is agreed that, in contracting for speakers, party of the first part acts as agent of local Club, that such contracts are non-cancelable, and that party of the first part assumes no obligation for any expense except speakers' fees and local expense approved in writing by First Party or its agents.

All speakers shall be secured through party of first part during entire life of the Club. During first fiscal year party of first part is authorized to select guest speakers at its discretion. After first year, speakers shall be approved in writing at a personal meeting with representatives of first party, or notice of the selection of each speaker shall be submitted by first party in writing or by wire to local secretary. If name of speaker is submitted by wire, local secretary shall have forty-eight hours in which to wire veto on speaker offered; if submitted by letter, local secretary may file written veto at any time so that it will reach National office within ten days of time original offer is postmarked at National office. If no veto is filed within above time, speaker shall be considered approved and first party is authorized to contract definitely for same. For speakers appearing without charge or for expenses only, a service fee of \$25.00 shall be paid by local Club to party of first part after first year. Local Club agrees to grant reciprocity of

membership to all men's dinner clubs associated with party of [22] the first part.

No local person shall be liable under any circumstances for any obligation except local expense incurred without approval of first party, or its representative. First party shall have right to reorganize local Club should death, removal or other cause ever leave local organization without proper officers for conduct of its business.

ASSOCIATED EXECUTIVES
CLUBS, INC.

By ELMER E. SCHOLTZ,
Party of First Part.

BUTTE (MONTANA)
EXECUTIVES CLUB,
Parties of Second Part.

By TOM J. DAVIS,
JAMES TULLIS,
E. R. BLINN.

Filed Jan. 12, 1948. [23]

[Title of District Court and Cause.]

STIPULATION SUPPLEMENTING AGREED
STATEMENT OF FACTS

It Is Hereby Agreed and Stipulated between the respective counsel for the parties hereto that the

Agreed Statement of Facts, heretofore filed herein, and more particularly Paragraph X thereof, may be amended by interlineation in the following particulars, to-wit: by adding to the end of said Paragraph X the following words: "As set forth in Exhibit "C", hereto attached and made a part hereof," and by attaching Exhibit "C" to said Agreed Statement of Facts.

Dated this 17th day of February, 1948.

T. J. DAVIS,
L. C. MYERS,
Attorneys for Plaintiffs.

JOHN B. TANSIL,
U. S. Attorney,

HARLOW PEASE,
Assistant U. S. Attorney,

EMMETT C. ANGLUND,
Assistant U. S. Attorney,
Attorneys for Defendant.

Approved Feb. 18, 1948.

R. LEWIS BROWN,
Judge. [25]

EXHIBIT "C"

Treasury Department
Washington

Office of:

Commissioner of Internal Revenue

Address reply to:

Commissioner of Internal Revenue
and refer to MT:M:DCH Cl. A-18155

Feb. 26, 1946.

Butte Executives Club
First National Bank Building
Butte, Montana

Gentlemen:

Reference is made to your claim for refund of \$382.00, representing admissions tax paid for the month of September 1945.

You contend that the purpose of the club is the education of its members; that each person admitted to membership is charged an initiation fee of \$10.00 and annual dues of \$10.00 payable in advance; that during the month of September 1945 the club collected from its members payments aggregating \$1,910.00 and that the sum of \$382.00 representing the tax computed on such amount was illegally collected from the club.

The evidence shows that the Associated Executives Clubs, Incorporated, chartered under the laws of the State of Delaware, has for its purpose the sale of educational and entertainment talent, through its activities as a booking agency, and the

promotion and organization of local Executives Clubs in various cities throughout the United States. The parent organization derives its revenue from an organization fee and membership fee of \$10.00 collected by the local Executives Clubs from each member. [26]

The evidence on file in this office discloses that your organization has as its primary purpose the procuring of lectures for the education and entertainment of its members and their guests and the collection of annual or season fees to pay to the booking agent the charges for the lectures and incidental expenses.

The agreement with Associated Executives Clubs, Incorporated, provides that \$1.00 per member shall be allotted for local expenses during the first year and all other income shall be used by the corporation for organization work and the speakers. After the first year all dues and fees shall be used to pay the speakers and incidental expenses, payment for each speaker to be made on the date of his appearance. All speakers must be secured through the corporation during the entire life of the club.

On the basis of the above evidence, it was held in a letter addressed to you on September 24, 1945, that since the privilege afforded the members of the Executives Club of Butte, Montana, is primarily the right of admission to the series of lectures, the so-called membership fee of \$10.00 being collected for the purpose of paying for the lectures, such fee is an amount paid for admission by season ticket

or subscription and is subject to the tax imposed by section 1700(a) of the Internal Revenue Code, as amended.

The claim filed by you for refund of the tax paid is, therefore, rejected in full.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

By /s/ D. S. BLISS,
Deputy Commissioner.

Filed Feb. 18, 1948. [27]

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION

To Theron Lamar Caudle, Assistant Attorney General, Andrew D. Sharpe, J. P. Wenchel, II, Special Assistants to the Attorney General, John B. Tansil, United States Attorney, Emmett C. Angland, Assistant United States Attorney, attorneys for defendant, Lewis Penwell, and to Lewis Fred Penwell and Susannah W. Penwell, Executor and Executrix respectively of the Estate of Lewis Penwell:

You and Each of You Please Take Notice that plaintiffs will on the 16th day of November, 1948, present to the Court the following motion for substitution:

Comes now the plaintiffs above named and move the Court for an order substituting Lewis Fred Penwell and Susannah W. Penwell, executor and executrix of the Estate of Lewis Penwell, for defendant, Lewis Penwell, on the grounds and for the reason that Lewis Penwell died subsequent to the filing of the complaint in the above entitled cause and said Lewis Fred Penwell and Susannah W. Penwell are the duly qualified and acting executor and [29] executrix of the Estate of said Lewis Penwell.

Dated this 27th day of October, 1948.

T. J. DAVIS,

L. C. MYERS,

Attorneys for Plaintiffs.

Service of foregoing Motion for Substitution acknowledged and copy received this 27th day of October, 1948.

JOHN B. TANSIL,

EMMETT C. ANGLAND,

Attorneys for Defendant.

Filed Nov. 10, 1948. [30]

[Title of District Court and Cause.]

ORDER OF SUBSTITUTION OF
PARTIES DEFENDANT

Upon motion of plaintiffs above named, it appearing to the Court that defendant Lewis Penwell died subsequent to the filing of complaint in the above entitled cause and that this is a proper cause, therefor; and it further appearing that all the parties, through counsel, have submitted the matter to the court:

It Is Ordered that Lewis Fred Penwell and Sussannah W. Penwell, executor and executrix of the estate of defendant Lewis Penwell, be substituted as defendants for defendant Lewis Penwell, deceased.

CHARLES N. PRAY,
Judge.

Dated November 19, 1948.

Filed and Entered Nov. 19, 1948. [32]

In the United States District Court, in and for the
District of Montana, Helena Division

Civil Action No. 350

JOHN N. NEWLAND, JAMES TULLIS,
GEORGE I. MARTIN, and BUTTE
EXECUTIVES CLUB, a non-profit unin-
corporated association,

Plaintiffs,

vs.

LEWIS PENWELL, individually and as COL-
LECTOR OF INTERNAL REVENUE FOR
THE DISTRICT OF MONTANA,

Defendant.

DECISION

This is an action to recover taxes alleged to have been illegally assessed and collected by the Collector of Internal Revenue. A claim for refund was filed under Sec. 3772, Title 26, U.S.C.A. by the "Butte Executives Club," by whom the tax was paid. The members of this club or association paid ten dollars as an initiation fee and also an annual dues charge of ten dollars, and the question seems to be whether these payments, or either of them, may be considered in the sense of an "admission to any place."

An agreed statement of facts is filed with the briefs, and from the facts agreed to, it appears that

paragraph 6 of Section 101.2 of the Regulations of the Commissioner of Internal Revenue, would have special application here, reading as follows: "Where a person or organization acquires the sole right to use any place or the right to dispose of all the admissions to any place for one or more occasions, the amount paid for such right is not subject to the tax on admissions. However, if the person or organization in turn sells admissions to the place, the tax will apply to amounts paid for such admissions." Under the foregoing regulation and the admitted facts, counsel contend that the club has the sole right to dispose of admissions to members or members and guests, and that no admissions are sold, and therefore the club and the amounts in question are not taxable.

It seems quite evident from a plain reading of Section 1710, U. S. C. A., Title 26, that it would not apply to a club organized [34] "for the education of its members through informational talks." Exhibit A, By-Laws, Article II, Section 1. To further emphasize the educational purpose of the club it is also provided in Exhibit B that the club shall exist for "the sole purpose of promoting educational, patriotic, cultural and scientific interest in the above-named city and state." A number of cases have been cited showing plainly the difference between an educational club and a social club which would lend weight to plaintiff's construction of the definition found in Section 101.25 of Regulation 43, and it is further contended that even if the Butte Club could be classified as a social club, it would not be subject to the tax because of the size of the

initiation fee and annual dues under Section 1710, Title 26, as amended, and Section 1712(b), Title 26, U. S. C. A.

The court is unable to agree with the contention that this court is without jurisdiction to hear this cause; there seems to be abundant authority to the contrary. Title 28, Sec. 41(5), U. S. C. A. Rule 17(b) and 23, Rules of Federal Procedure; Builders Club of Chicago vs. U. S., 14 Fed. Supp. 1020.

The court has considered briefs of counsel, statutes, regulations, rules and authorities cited, and without further amplifying this decision, is of the opinion that it satisfactorily appears that the club in question is entitled to a refund of the taxes paid, and such is the order herein. Accordingly, findings and conclusions may be submitted, and form of judgment; each side bearing its own costs.

CHARLES N. PRAY,

Judge.

Filed January 13, 1949.

Entered and noted in civil docket January 14, 1949. [35]

[Titles of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Findings of Fact

The parties in the above entitled cause having submitted to the Court an agreed statement of facts,

the Court finds the facts to be as stipulated and said agreed statement of facts is incorporated herein, among which facts it appears that the Butte Executives Club collected an aggregate amount of \$1910.00 from its members for the year from July 1, 1945, to July 1, 1946, and that the Commissioner of Internal Revenue treated the said collection as payments "for admission to any place" and collected from plaintiff, Butte Executives Club, upon the 20th day of October, 1945, the sum of \$382.00 as a tax upon "admissions to any place."

Conclusions of Law

From the foregoing stipulated facts, the Court draws the following conclusions of law, to-wit:

1. That the tax was illegally assessed and collected; [37]

2. That the Butte Executives Club, plaintiff, is entitled to a refund of the tax paid on the 20th day of October 1945, in the sum of \$382.00, together with interest at six per cent from said day; that each of the parties should bear their respective costs.

Done In Open Court this 5th day of February, 1949.

CHARLES N. PRAY,

Judge.

Filed Feb. 5, 1949. [38]

In the District Court of the United States for the
District of Montana, Helena Division

Civil No. 350

JUDGMENT

JOHN N. NEWLAND, JAMES TULLIS,
GEORGE I. MARTIN, and BUTTE EXECU-
TIVES CLUB, a non-profit unincorporated
association,

Plaintiffs,

vs.

LEWIS FRED PENWELL and SUSANNAH W.
PENWELL, executor and executrix of the
estate of Lewis Penwell, deceased, defendants,
substituted in place of Lewis Penwell, Collector
of Internal Revenue for the District of Mon-
tana,

Defendants.

This cause having been heretofore submitted to
Honorable R. Lewis Brown, upon an agreed state-
ment of facts and briefs, and said Judge having
died prior to rendering a decision, and Judge
Charles N. Pray having on the 19th day of Novem-
ber, 1948, accepted jurisdiction upon stipulation of
the parties to decide the matter, and after due con-
sideration of the matter by the court, and upon the
5th day of February, 1949, the Court having made
its findings of fact and conclusions of law as fol-
lows, to-wit:

“Findings of Fact and
Conclusions of Law

“The parties in the above entitled cause having submitted to the Court an agreed statement of facts, the Court finds the facts to be as stipulated and said agreed statement of facts is incorporated herein, among which facts it appears that the Butte Executives Club collected an aggregate amount of \$1910.00 from its members for the year from July 1, 1945, to July 1, 1946, and [40] that the Commissioner of Internal Revenue treated the said collection as payments “for admission to any place” and collected from plaintiff, Butte Executives Club, upon the 20th day of October, 1945, the sum of \$382.00 as a tax upon “admissions to any place.”

“Conclusions of Law

“From the foregoing stipulated facts, the Court draws the following conclusions of law, to-wit:

“1. That the tax was illegally assessed and collected;

“2. That the Butte Executives Club, plaintiff, is entitled to a refund of the tax paid on the 20th day of October, 1945, in the sum of \$382.00, together with interest at six per cent from said day; that each of the parties should bear their respective costs.” And upon being fully apprised in the premise,

The Court orders, adjudges and decrees, and this does order, adjudge and decree that the plaintiff, Butte Executives Club, does have and recover of the defendants, Lewis Fred Penwell and Susannah W. Penwell, executor and executrix of the estate of

Lewis Penwell, deceased, substituted in the place of Lewis Penwell, Collector of Internal Revenue for the District of Montana, the sum of \$382.00, together with interest from the 20th day of October, 1945, at the rate of six per cent; the parties hereto each to bear the costs by them incurred in the action.

Done In Open Court this 5th day of February, 1949.

CHARLES N. PRAY,
Judge.

Filed February 5, 1949.

H. H. WALKER,
Clerk.

By /s/ C. G. KEGEL,
Deputy.

Entered and noted in Civil Docket Feb. 7, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the above named plaintiffs and to

T. J. Davis and L. C. Myers, their attorneys:

Notice Is Hereby Given that Lewis Penwell, individually and as Collector of Internal Revenue, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered

in this cause on the 5th day of February, 1949, in favor of the plaintiffs and against the defendant, and from the whole of said judgment.

Dated April 6, 1949.

JOHN B. TANSIL,

U. S. Attorney,

HARLOW PEASE,

Assistant U. S. Attorney,

EMMETT C. ANGLAND,

Assistant U. S. Attorney,

Attorneys for Defendants.

Service of the foregoing notice of appeal is hereby admitted this 6th day of April, 1949.

T. J. DAVIS,

L. C. MYERS,

Attorneys for Plaintiffs.

Filed April 6, 1949.

[Title of District Court and Cause.]

ORDER

Upon application of the United States Attorney for the District of Montana and good cause appearing:

It Is Hereby Ordered that the defendant in the above-entitled cause have thirty (30) days in addition to the time allowed by law for docketing and filing the record on appeal pursuant to Rule 73G of the Rules of Civil Procedure.

Dated this 13th day of May, 1949.

CHARLES N. PRAY,
Judge.

Filed May 13, 1949.

Entered and noted in Civil Docket, May 14, 1949.

[Title of District Court and Cause.]

DESIGNATION

Comes now the above named defendants who were on the 9th day of November, 1948 substituted as defendants for Lewis Penwell, individually and as Collector of Internal Revenue for the District of Montana, and designate the portions of the record and proceedings to be contained in the record on appeal herein:

The defendants designate the entire record herein,

including the Complaint, the Answer, the Agreed Statement of Facts, the Decision of the Court, the Court's Findings of Fact and Conclusions of Law, and the Judgment as entered.

Dated this 26th day of May, 1949.

JOHN B. TANSIL,

U. S. Attorney,

HARLOW PEASE,

Assistant U. S. Attorney,

EMMETT C. ANGLAND,

Assistant U. S. Attorney,

Attorneys for Defendants.

Service of the foregoing Designation is hereby admitted this 26th day of May, 1949.

T. J. DAVIS,

L. C. MYERS,

Attorneys for Plaintiffs.

Filed May 26, 1949.

[Title of District Court and Cause.]

ORDER

Upon application of the United States Attorney for the District of Montana and good cause appearing:

It Is Hereby Ordered that the defendant in the

above entitled cause have ten days in addition to the time heretofore allowed for docketing and filing the record on appeal pursuant to Rule 73G of the Rules of Civil Procedure.

Dated this 14th day of June, 1949.

CHARLES N. PRAY,
Judge.

Filed June 14, 1949.

Entered and Noted in Civil Docket, June 15, 1949.

In the District Court of the United States in and
for the District of Montana

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of forty-nine pages, numbered consecutively from 1 to 49 inclusive, constitutes a full, true and correct transcript of all portions of the record in Case No. 350, John N. Newland, et al., vs. Lewis Fred Penwell, et al., designated by the parties as the record on appeal therein, as appears from the original records and files of said Court in my custody as such clerk.

I further certify that the costs of said transcript

amount to the sum of Fourteen and 20/100 Dollars (\$14.20) and have been made a charge against the United States, the appellant.

Witness my hand and the seal of said court at Helena, Montana, this 15th day of June, A.D. 1949.

[Seal] /s/ H. H. WALKER,

Clerk U. S. District Court, District of Montana.

[Endorsed]: No. 12271. United States Court of Appeals for the Ninth Circuit. Lewis Fred Penwell and Susannah W. Penwell, Executor and Executrix of the Estate of Lewis Penwell, formerly Collector of Internal Revenue for the District of Montana, deceased, Appellants, vs. John N. Newland, James Tullis, George I. Martin, and Butte Executives Club, a non-profit unincorporated association, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed June 17, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

Statement of Points on Which Appellants Intend
to Rely on Appeal

The points upon which the appellants (defendants below) intend to rely on appeal are:

1. The court erred by holding that the initiation fee of \$10 and the dues of \$10 collected from each member of the Butte Executives Club were not charges for admission to any place as that term is used in Section 1700 (a) (1) of the Internal Revenue Code.

2. The court erred by rendering judgment for appellees (plaintiffs below).

/s/ THERON L. CAUDLE,
Assistant Attorney General.

Docketed.

Filed July 15, 1949, U.S.C.A.

In the United States Court of Appeals
for the Ninth Circuit

No. 12271

LEWIS FRED PENWELL and SUSANNAH W.
PENWELL, Executor and Executrix of the
Estate of LEWIS PENWELL, deceased,
Appellants,

vs.

JOHN N. NEWLAND, JAMES TULLIS,
GEORGE I. MARTIN, and BUTTE EX-
ECUTIVES CLUB, a non-profit unincorpor-
ated association,

Appellees.

DESIGNATION OF RECORD TO BE PRINTED

The appellants hereby designate the entire record
on appeal to be printed.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

Docketed.

Filed July 15, 1949, U.S.C.A.